COFFEY CONSTRUCTION COMPANY, INC.

CONTRACT NO. V101C1650 **VABCA-3473E**

VA MEDICAL CENTER PITTSBURGH, PENNSYLVANIA

Bernadine T. Harrity, Esq., Pittsburgh, Pennsylvania, for the Applicant.

Kenneth B. MacKenzie, Esq., Trial Attorney; ***Phillipa L. Anderson, Esq.***, Deputy Assistant General Counsel; and ***William E. Thomas, Jr., Esq.***, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION OF ADMINISTRATIVE JUDGE PULLARA

Coffey Construction Company, Inc. (Coffey, Contractor or Applicant) seeks attorney fees and other expenses totaling $74,631.18 under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, following the favorable decision it obtained in VABCA No. 3473. ***Coffey Construction Company, Inc.***, VABCA No. 3361, 3432 & 3473, 93-2 BCA ¶ 25,788, *mot. recon. granted in part*, VABCA No. 3473R, 1993 WL 218210 (June 16, 1993). VABCA No. 3473 concerned a 241-day delay in contract completion and $282,452 in liquidated damages that the VA withheld from payments to the Contractor. In a companion appeal, VABCA No. 3432, the Contractor attributed 228 of the 241 days of delay to VA suspensions and sought a 228-day time extension and compensation for delays in the amount of $1,656,856.71, as well as release of withheld contract funds. A third appeal, VABCA No. 3361, was effectively subsumed into the delays considered in the two appeals above and need not be considered further herein. Applicant is seeking the following:

VABCA No. 3473

Attorney fees (376.5 hrs. x $125/hr.)	$47,062.50
Expenses 23,849.93	

VABCA No. 3473E

Prep. EAJA Appl. (3 hrs. x $125/hr.)	375.00
Prep. Resp. to Govt. Ans. (21.5 x $125/hr.)	2,687.50
Prep. Resp. to Board Memo (5.25 hrs. x $125/hr.)	656.25
TOTAL:	$74,631.18

The contract at issue in ***Coffey Construction Company, Inc.*** was a 12-month demolition and construction project at the VA Medical Center, Aspinwall Division, Pittsburgh, Pennsylvania, which became a 20-month project. Coffey blamed all delays on the Government, while the VA attributed all delays to the Contractor.

In a decision dated February 11, 1993, the Board found that "delays to the project as a whole were inextricably intertwined and were caused jointly and concurrently by both parties." Accordingly, the Board left "the parties where we find them," i.e., the Government was not entitled to liquidated damages (VABCA No. 3473), nor was the Contractor entitled to compensation for delay damages, except for one day admitted by the Government (VABCA No. 3432). Thus, VABCA No. 3432 was denied in all material respects and VABCA No. 3473 was granted "to the extent that Appellant is entitled to remission of liquidated damages in the amount of $232,056 ($282,452-$50,396) plus interest." ***Coffey Construction Company, Inc.***, VABCA No. 3473, 93-2 BCA ¶ 25,788. In its decision on a motion for reconsideration, issued on June 16, 1993, the Board increased the Applicant's total recovery to $258,200 plus interest. ***Coffey Construction Company, Inc.***, VABCA No. 3473R, 1993 WL 218210 (June 16, 1993).

Coffey filed this application for attorney fees and expenses under VABCA No. 3473, asserting that it is the prevailing party in VABCA No. 3473 because the Government position, that it was entitled to 241 days of liquidated damages, was not substantially justified. Applicant also states that it qualifies under the eligibility criteria of number of employees and net worth.

The Government does not dispute that Coffey meets the eligibility requirements of EAJA and that the Contractor prevailed in VABCA No. 3473. However, the Government seeks to disclaim any liability for EAJA recovery by Applicant on the ground that the Government offered to settle before trial, on a basis equal to, or more favorable, than that which Applicant recovered from the Board's decision.

It is asserted that in April 1990, the Government offered "to settle all claims for a no cost time extension until the date of actual substantial completion." Later, at an Alternative Dispute Resolution proceeding in April 1992, the Government states that it "offered to settle all claims for the remission of liquidated damages ($282,452) plus an additional $125,000." The Government thus argues that its position was substantially justified, because the Applicant's recovery following trial was less than the Applicant would have recovered from the offers of settlement. In support of its position, the Government cites ***N & P Construction Co., Inc.,*** VABCA Nos. 3283E & 3286E, 93-3 BCA ¶ 26,257, for the proposition that "[i]f the amount awarded by the Board is no greater than the Government's offer, the Appellant has not received any monetary benefits from *postoffer* services of its attorney." (Govt Ans. at 2)

In the alternative, the Government argues that if the Board does allow recovery, then the Board should apply three limitations. First, the Board should limit Applicant's recovery for attorney fees to $75 per hour. Second, the Board is urged to "apportion expenses in some rational relationship" between the liquidated damages claim in which Coffey prevailed and the delay claim in which it did not, although the Government is "unable to offer a recommendation by which the claimed costs might be apportioned." Third, because the Board had little faith in the schedule provided by the Applicant's CPM consultant, "the cost of generating it must be deemed to be unreasonable," citing ***Buckley Roofing Company, Inc.***, VABCA No. 3374E, 92-2 BCA ¶ 24,826.

Applicant resists allocation of any of its claimed costs to its unsuccessful delay claim (VABCA No. 3432), arguing that "the time and expenses associated with VABCA 3432

[Coffey's delay claim] are inextricably intertwined with VABCA 3473 [the Government's liquidated damages claim]."

Offer of Settlement

At the Board's request, both parties submitted arguments regarding the application of ***AST Anlagen-und Sanierungstechnik GmbH***, ASBCA No. 42118, 93-3 BCA ¶ 25,979. In that case, the Government had offered that applicant DM (Deutsche Mark) 650,000 immediately prior to the hearing, which the applicant rejected. The Armed Services Board of Contract Appeals awarded the applicant DM 486,152. Information concerning this offer and its rejection were first presented as part of the Government's EAJA submission. Such information had not been provided at the hearing and, therefore, had not been made a part of the underlying record. In rejecting evidence of the settlement offer during the EAJA proceeding, the Armed Services Board noted, "[m]oreover, on this issue of substantial justification, we cannot consider the affidavits accompanying the EAJA submissions regarding settlement offers and rejections, because evidence thereof does not appear in the record of the underlying appeal, as required by 5 U.S.C. Sec. 504 (a)(1)."

Not surprisingly, the Applicant maintains that, "***AST Anlagen*** is applicable and controlling concerning the subject EAJA Application . . . affidavits accompanying EAJA submissions regarding settlement offers and rejections cannot be considered on the issue of substantial justification because such evidence does not appear in the record of the underlying appeal as required by 5 U.S.C. 504(a)(1)."

For its part, the Government argues that, "the ASBCA's interpretation of the term 'administrative record' is too restrictive and urges the Board to adopt an interpretation which will allow the submission of affidavits regarding the rejection of offers of settlement as part of the EAJA submission." The Government further maintains that because the Board was willing to accept a sealed memorandum which contained information about the proposed settlement at the time of the hearing, as it did in ***Marino Construction Co., Inc.,*** VABCA No. 2752E, 92-2 BCA ¶ 25,015, then the Board should be willing to accept the same information as part of an EAJA submission.

In that regard, EAJA states that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record." To assure that evidence of settlement offers was included in the underlying record for consideration in the event of a later EAJA application, a practice has developed, with the approval of this Board, whereby Government Counsel would file, during litigation, a sealed envelope containing the rejected settlement offer. Government Counsel here is quite familiar with such practice since he used it successfully in ***Marino Construction Co., Inc.,*** VABCA No. 2752E, 92-2 BCA ¶ 25,015. The method was also employed in ***Bridgewater Construction Corp.***, VABCA Nos. 2956E, *et al.*, 92-3 BCA ¶ 25,064.

This process bears some similarity to Rule 68 of the Federal Rules of Civil Procedure, "Offer of Judgment," whereby a defending party may serve upon the adverse party, before trial, an offer of settlement. If the offer is not accepted and the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. In the notes to the rule, it is stated that this

provision is expected to encourage settlements and avoid protracted litigation.

The procedure of furnishing a sealed envelope while the matter is being heard on the merits protects the confidentiality of the ADR process and precludes any possible prejudice to either party from the disclosure of the settlement offer to the fact finder. Moreover, it fosters settlement at an early date in the process and prevents ambiguity or later differences as to the nature of the settlement offer, because the parties are forced to put the offer in writing.

In the instant case, the Government did not seek to have a sealed envelope containing information concerning settlement included in the underlying administrative record. Accordingly, the Government is precluded from offering such evidence during this EAJA proceeding. We now consider the amount of fees and expenses to which Applicant is entitled.

CPM CONSULTANT FEES

The Government argues that the CPM Consultant fees should be deemed unreasonable, citing ***Buckley Roofing Company, Inc.***, VABCA No. 3374E, 92-2 BCA ¶ 24,826, for the proposition that, "fees and expenses awarded under EAJA must be reasonable." In ***Buckley***, the "reasonableness" argument centered on awarding nearly $2,000 under EAJA, where the underlying appeal was worth $2,230 and the issues were not complex. However, the Government does not explain how that case is applicable to the facts presented here. Although the CPM data was not determinative, nevertheless, the Board is not persuaded that the claimed expenses were neither of value nor reasonably incurred in Applicant's defense against the Government's liquidated damages claim (VABCA No. 3473) and Applicant's prosecution of its delay damages claim against the Government (VABCA No. 3432). These charges will be apportioned between those two appeals, however, as discussed below.

HOURLY RATE

Coffey seeks attorney fees of $125 per hour, however, the $75 per hour rate allowed by this Board is set by statute. The Board lacks the authority to award a greater hourly rate absent a Departmental regulation increasing the present limit. 5 U.S.C. § 504(b)(1)(A). *See also,* ***Buckley Roofing Company, Inc.***, VABCA No. 3374E, 92-2 BCA ¶ 24,826, ***Delfour, Inc.***, VABCA Nos. 2049E, 2215E, 2539E, 2540E, 90-3 BCA ¶ 23,066, ***Berkeley Construction Company, Inc.***, VABCA No. 1962E, 88-3 BCA 20,941. Accordingly, the Applicant's recovery is limited to $75 per hour.

APPORTIONMENT OF FEES AND EXPENSES

The Applicant indicates that the fees and expenses requested are only those connected with its prevailing appeal, VABCA No. 3473. The Government suggests that the Board apportion the fees and expenses requested, but gives no advice on how the Board should do so.

Applicant would have us award all fees and expenses claimed herein on the basis of its having prevailed in VABCA No. 3473, in which the Government's quarter million dollar

liquidated damages claim was denied, without allocation or apportionment of any such fees and expenses to VABCA No. 3432, in which the Applicant's $1.6 million delay claim was denied. That position is based on the argument that "the proof necessary to establish entitlement to the liquidated damages [relief] was the same proof necessary to establish Government-caused delays." (App. Resp. at 6)

As a general proposition we disagree. Different criteria and proof are required in excusable delay and compensable delay claims. In order to recover on its $1.6 million affirmative delay claim, Applicant was required to prove that the Government was the sole cause of delay, thereby eliminating all other possible causes, including acts of third parties, acts of God and, most importantly, Applicant's own acts or omissions. The effort necessary to sustain that burden is far greater than an effort sufficient merely to defeat the Government's claim for liquidated damages.

What is central in the case before us, however, is that we are unable to determine from the record the extent to which attorney fees and expenses are attributable to either VABCA No. 3432 or 3473. As in the case on the merits, where the causes of delay were found to be intertwined, so too were the Contractor's litigation efforts intertwined. It is not appropriate to award fees associated with the appeal in which the Applicant did not prevail. On the other hand Applicant should recover for the effort it expended on its successful claim. See ***Hensley v. Eckerhart***, 461 U.S. 424 (1983); ***Danrenke Corp.,*** VABCA Nos. 3601E, 3721E, 3722E, & 3736E, 1993 WL 451243 (October 29, 1993) and ***N & P Construction Co., Inc.,*** VABCA Nos. 3283E & 3286E, 93-3 BCA ¶ 26,257. Accordingly, in the absence of any help from either counsel, we find that half of Applicant's fees and expenses in the litigation are attributable to VABCA No. 3473, as set forth below. Adding those figures to the fees incurred in the processing of this application produces the following:

VABCA No. 3473

Attorney fees (½ x 376.5 hrs. x $75/hr.)	$14,118.75
Expenses (½ x $23,849.93)	11,924.97

VABCA No. 3473E

Prep. EAJA Appl. (3 hrs. x $75/hr.)	225.00
Prep. Resp. to Govt. Ans. (21.5 x $75/hr.)	1,612.50
Prep. Resp. to Board Memo (5.25 hrs. x $75/hr.)	393.75
TOTAL:	$28,274.97

DECISION

For the foregoing reasons, the Board awards the Applicant fees and expenses in the amount of $28,274.97, pursuant to the Equal Access to Justice Act.

DATE: **December 14, 1993**

MORRIS PULLARA, JR.
Administrative Judge
Panel Chairman

We concur:

GUY H. McMICHAEL III
Chief Administrative Judge

JAMES K. ROBINSON
Administrative Judge